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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GEORGE I. JOHNSON, Defendant and Appellant.	B160532 (Los Angeles County Super. Ct. No. PA039081)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles L. Peven, Judge. Affirmed in part, reversed in part and remanded.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz and Jeffrey B. Kahan, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant George I. Johnson was found guilty by a jury of assault on a peace officer with a semiautomatic firearm, attempted carjacking, and possession of a firearm by a felon. Sentenced to prison for a term of 33 years and 10 months he appeals, contending the judgment must be reversed because the trial court failed to instruct the jury on voluntary intoxication as applied to the specific intent element of the alleged attempted carjacking. Respondent concedes the error, but contends it was not prejudicial. After review of the entire record we conclude the error was not harmless. Accordingly, we affirm appellant's convictions of assault on a peace officer with a semiautomatic firearm and possession of a firearm by a felon, and reverse his conviction of attempted carjacking. We remand for the limited purpose of retrial of the attempted carjacking count and for resentencing thereafter.

FACTUAL AND PROCEDURAL SUMMARY

The evidence, recounted in the light most favorable to the judgment, proved that on June 29, 2001, at approximately 3:00 a.m. California Highway Patrol Officers Richard Cheever and Efrem Moore stopped a 1995 Land Rover driven by appellant for failure to display a rear license place. During the traffic stop the officers learned that appellant was driving on a suspended Ohio license. They also concluded, based on field sobriety tests, that appellant had been driving under the influence of alcohol and possibly marijuana. When Officer Moore attempted to handcuff appellant, a verbal and physical confrontation ensued during which Officer Cheever twice sprayed appellant in the eyes with pepper spray. The pepper spray did not have the anticipated effect, causing Officer Cheever to believe that appellant was "so intoxicated that pepper spray wasn't affecting him."

Appellant managed to get away from the arresting officers, running up a dirt embankment to a freeway with Officer Cheever in pursuit. During the foot chase which followed, appellant fired a handgun at Officer Cheever, and Officer Cheever returned the shots.

Appellant went to a Chevron gas station where he attempted to pay a customer for a ride, saying he needed to get out of there. The man declined, but suggested appellant ask another man who was outside filling his truck with gas. The clerk, noticing that appellant was bleeding, offered to call an ambulance. Appellant refused. Appellant went outside and got into the passenger side of a truck owned by Daniel High, saying that he needed help because someone was trying to kill him. Appellant offered Mr. High money to drive him to a friend's house. Mr. High refused. Appellant then asked if the truck was insured. When Mr. High responded that it was, appellant told him to tell police he had stolen the truck and the insurance company would give him a new truck. Mr. High refused. Mr. High tried, unsuccessfully, to get the attention of passing police, but appellant told him not to do that. Appellant pulled a gun from his waist and asked Mr. High to hide it. When Mr. High refused, appellant put it under the passenger seat. Appellant then demanded the keys for the truck, repeating his command at gun point when Mr. High refused. Mr. High grabbed his keys, phone, and wallet and ran towards the Chevron store for help.

Police who arrived at this moment, ordered appellant to drop the gun and put his hands up. Appellant ignored the order even though it was repeated continuously for approximately 45 seconds. Instead, appellant took cover behind a parked vehicle, where he dropped his gun. Then he surrendered.

The gun was determined, by Los Angeles Police Department criminalist, to be the one shot at California Highway Patrol Officer Cheever.

DISCUSSION

Appellant contends he was deprived of his constitutional right to due process because the trial court failed to instruct the jury on voluntary intoxication in the words of CALJIC 4.21.1 with respect to the attempted carjacking count. Respondent concedes the instruction should have been given in light of evidence that appellant smelled of alcohol and marijuana, failed a series of sobriety tests and exhibited a resistance to pepper spray. Respondent argues, however, that the error was harmless.

We agree with the parties that there was instructional error. Carjacking is a specific intent crime. (See *People v. Howard* (1997) 57 Cal.App.4th 323, 328.) And the evidence of intoxication was, as respondent concedes, sufficient to require that the instruction be given on defense counsel's request. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) The determinative issue is whether the error was prejudicial.

Appellant argues the effect of the error must be judged under the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18) because it impacted his constitutional right to have the jury determine whether the prosecution proved every element of the crime beyond a reasonable doubt. Under that standard, reversal is required unless it appears that the error is harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra,* 386 U.S. at p. 24.)

Respondent reasons that since California could preclude a voluntary intoxication defense without offending the federal constitution, no federal constitutional right is implicated and the effect of the error must be judged under the *Watson* standard, allowing reversal only where the reviewing court "'after an examination of the entire cause, including the evidence,' is of the 'opinion' that

it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People* v. *Watson* (1956) 46 Cal.2d 818, 836.) Respondent argues that evidence of appellant's "goal-oriented desire to evade arrest or minimize the evidence against him" demonstrates the error was harmless under the *Watson* standard.

We need not determine whether the stricter *Chapman* standard applies because even under the *Watson* standard reversal is required. This is not a case where the instructional error concerned an uncontested or peripheral element of the offense. Nor is it a case in which the error "had nothing to do with defendant's own actions or mental state . . . ." (*People v. Flood* (1998) 18 Cal.4th 470, 507.) The question of whether appellant was capable of forming "the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his . . . possession" (Pen. Code, § 215, subd. (a)) was the crucial issue on the carjacking count. In light of the evidence that appellant initially sought only a ride, together with evidence of his intoxication, including the officers' intent to arrest him for that crime, and Officer Cheever's belief that appellant was "so intoxicated" that pepper spray had little effect on him, it appears reasonably probable that appellant would have achieved a more favorable result on the carjacking count in the absence of the error.

DISPOSITION

For the foregoing reasons, we affirm appellant's convictions of assault on a peace officer with a semiautomatic firearm and possession of a firearm by a felon, and reverse his conviction of attempted carjacking. We remand for the limited purpose of retrial of the attempted carjacking count and for resentencing thereafter.

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HASTINGS, J.

We concur:

VOGEL (C.S.), P.J.

CURRY, J.